

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM DARLINGTON COUNTY
Court of Common Pleas

Paul M. Burch, Circuit Court Judge

Case No. 2014-CP-16-0792
Appellate Case No. 2020-000745

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May 12 2020

S.C. SUPREME COURT

State Farm Mutual Automobile
Insurance Company,Respondent,

v.

Beverly Goyeneche, David R. Gray, III, and
Amanda Goyeneche (a/k/a Amanda Goyeneche-Gray),
individually and as Parent and Natural Guardian of S.G., Defendants,

Of whom
Beverly Goyeneche and Amanda Goyeneche are..... Petitioners.

Reply

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Argument

Petitioners Beverly Goyeneche and Amanda Goyeneche write solely to address Respondent State Farm Mutual Automobile Insurance Company's incorrect assertions that this appeal is moot and the arguments unpreserved.

Despite initiating the underlying declaratory judgment, Respondent now injects a statute of limitations defense in an attempt to sidestep the question of coverage—the very reason it brought this action in the first place. Absent from Respondent's request that this Court take judicial notice that the statute of limitations has passed is any mention of *when* that allegedly occurred. Undoubtedly, this is because what Respondent now suggests is that the Court of Appeals squandered its time in the pointless exercise of answering this complicated coverage issue because the issue is moot. Petitioners assumes Respondent would claim that the statute ran three years from May 8, 2014, which was the date of Child's death. Thus, that calculation would suggest the statute of limitations ran May 8, 2017 – prior to oral argument before the Court of Appeals on June 7, 2018, the issuance of the opinion on December 18, 2019, and the filing of the petition for rehearing on December 23, 2019.

These procedural machinations should be ignored. The statute of limitations is an affirmative defense that can be waived and bringing it up almost three years after the fact is inarguably waiver. *RWE NUKEM Corp. v. ENSR Corp.*, 373 S.C. 190, 197, 644 S.E.2d 730, 734 (2007) (noting a party can waive a statute of limitations defense by words or conduct, or any action or inaction that is inconsistent with the assertion of the defense); *see also Hooper v. Ebenezer Sr. Servs. & Rehab. Ctr.*, 386 S.C. 108, 115, 687 S.E.2d 29, 32 (2009) (holding that equitable tolling is permitted to “serve the ends of justice”). A party cannot be allowed to so cavalierly waste time and resources for years in litigation and appeals and expect accommodation in return.

In addition, Respondent's failure to propose a date also reveals that the question of whether the defense even applies is for the fact finder and thus has no place in this forum. *RWE NUKEP Corp.*, 373 S.C. at 197, 644 S.E.2d at 734 (noting that the applicability of an affirmative defense is a question for the fact finder); *see also Hooper*, 386 S.C. at 115, 687 S.E.2d at 32 (holding a party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use). Ultimately, Respondent is merely making a veiled threat that it will not honor the insurance contracts it entered if this Court were to agree with Petitioners.

The pleadings and the procedural posture demonstrate that this case is properly before this Court because Petitioners are entitled to relief. From the outset of this litigation, both parties understood this matter to be one directed at coverage. Petitioner Amanda Goyeneche, as both a named insured and as personal representative of her child's estate, made a damages claim for coverage.¹ (App.18-22). As acknowledged in Respondent's pleadings, her claim was denied. Respondent subsequently filed this action to which Petitioners answered and counterclaimed. (App. 24-26). Included within the counterclaim was a request that the Court find that the insurance policies provide coverage for Petitioners' claims and hold Respondent liable for the damages. (App. 26). As pled, this counterclaim provides a viable claim for damages upon which relief may be granted. *S.C. Ins. Co. v. Barlow*, 301 S.C. 502, 508, 392 S.E.2d 795, 798 (Ct. App. 1990)

¹ Notably, Petitioner as personal representative has a distinct fiduciary duty to the estate, which includes only expending time and resources that are in the best interest of the estate. *See generally* S.C. Code Ann. § 62-3-703 (Supp. 2008); S.C. Code Ann. § 62-1-201 (Supp. 2008); *O'Shea v. Lesser*, 308 S.C. 10, 15, 416 S.E.2d 629, 631 (1992) ("A fiduciary relationship exists when one reposes special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interests of the one reposing confidence."). Practically, the current action is the only action that was viable at the time. To suggest otherwise defeats the primary purpose of a declaratory judgment.

(excusing formality because to hold otherwise would amount to a sacrifice of substance to form). Thus, this appeal is not moot.

As to preservation, this case has always been one about indemnification. Whether Respondent is required to pay the loss from its policies, is squarely before this Court. To suggest otherwise, is an attempt to play a gotcha game, which Petitioners decline to play. *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 332–33, 730 S.E.2d 282, 287 (2012) (Toal, C.J, concurring) (“[A]n over-zealous application of appellate preservation rules denigrates the primary purpose of the judiciary, which is to serve the citizens and the business community of this state by settling disputes and promoting justice.”).

Conclusion

For the foregoing reasons, as well as the reasons set forth in the previous briefs, this Court should grant this petition and reverse the judgment below.

Respectfully submitted,

May 11, 2020

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